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IN THE

SUPREME COURT OF THE UNITED STATES

TERM OF OCTOBER, 1971

No. 71-843

COUNTY OF WAYNE and THE BOARD OF SUPERVISORS OF THE COUNTY OF WAYNE, BOARD OF AUDITORS OF WAYNE COUNTY, TREASURER OF WAYNE COUNTY,
Petitioners-Defendants,

v.

JUDGES FOR THE THIRD JUDICIAL CIRCUIT OF THE STATE OF MICHIGAN
Respondents-Plaintiffs.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT

The Judges for the Third Judicial Circuit (the Wayne County Judges) cannot accept the statement of the case made on behalf of Defendants-Appellants, Wayne County Board of Supervisors (the County) in the Petition for Certiorari (the Petition) because such statement is incomplete and does not fairly present the issues.

1. The County now says (Petition, p. 5) that the "prime

factor" for the rejection of the Wayne County Judges' request for seven probation officers, four law research clerks and a judicial assistant "was the financial ability of the County to meet requests for increased personnel from current revenue." To the contrary, the reason given by the Ways and Means Committee of the Wayne County Board of Supervisors for such rejection of the request for any additional probation officers was stated to be:

> " 'Over a period of years the Board of Supervisors has sought the cooperation of the judges of the Circuit and Recorder's Courts to obtain amendatory legislation which will eliminate the discrimination against the County of Wayne of being ineligible to receive the same probation officer service paid by the State of Michigan which is provided by the State for other counties and courts.[1] It is the judgment of the Committee that the County should not continue to fund with local taxpayers money the complete needs of the probation services of these two courts while the remainder of the courts of the State enjoy substantial assistance from the State. If Wayne County obtained, on a proportional basis, this aid from the State it would provide substantially increased probation services over and above that which is proposed to be provided by the addition of seven new positions. The Committee believes that as long as the County of Wayne continues to meet the needs of this probation service, neither the State nor the

[1] Under C.L. '48, 791.225, MSA 28.2295, it is provided that state service grants may be given to Counties when it shall appear "that any county is unable to equitably maintain its probation program according to the standards set by the state bureau of probation." But, this statute by its terms does not apply to counties such as Wayne County, having a population in excess of 500,000 (C.L. '48, 791.226; MSA 28.2296). Probation in Wayne County is governed by a different statute, C.L. '48, 771.1, et seq.; MSA 28.1131, et seq., which does not provide for any state assistance.

representative of the two courts will hasten the amendatory change which will give equitable State support to the probation service needs of Wayne County.

We, therefore, are recommending deletion of the following new positions proposed by the Board of Auditors:

Circuit Court Probation Department—Eliminate two new positions of Probation Officer I and two desks and chairs.' " *(Pre-Trial Stipulation (d)* and *Exhibit 1).*

It was conceded at trial that the only budgetary cuts made in the Auditors' budget by the County were in connection with the budget of the Wayne County Judges. The total budget ultimately adopted by the County for the fiscal year 1967-68 was $127,160,325.00. The total annual salary cost of the additional employees requested by the Wayne County Judges was $193,096.00.

2. Prior to the filing of this Petition, the County did not at any time complain that Judge William John Beer of the Oakland County Circuit Court (designated to hear this cause by the Michigan Supreme Court Administrator) was personally biased or prejudiced against the County or had any personal or pecuniary interest in the litigation.

3. During the trial, the County did not contest the factual showing made by the Wayne County Judges:

(a) as to the reasonable necessity for the requested additional Probation Officers, Law Clerks and a Judicial Assistant;

(b) as to the reasonableness of the salaries established for such personnel; or

(c) as to the acute and urgent need for additional Probation Officers in light of the then existing caseloads.

Instead, the sole defense asserted by the County was that the Wayne County Judges were merely another subordinate branch of the county government and therefore subject to the absolute control of the County in all fiscal matters, and as a corollary thereto, that the matter of appropriations for the functioning of the Wayne County Circuit Court was within the absolute and unrestricted control of the County.

The trial court rejected this defense as a matter of law and entered judgment in mandamus for the Wayne County Judges.

The Michigan Court of Appeals, the intermediate court of appeals in Michigan, unanimously affirmed the trial court on February 10, 1969, 15 Mich App 713; 167 NW 2d 337. The Court of Appeals rejected the County's contention that the County had been deprived of due process of law under the Fourteenth Amendment to the Constitution of the United States because an Oakland County circuit judge had heard the case, saying, 15 Mich App at 731 (167 NW 2d 337):

> "It is the county's contention that no circuit judge could be impartial since the presented issue concerned the power of all Michigan circuit judges and; thus, all circuit judges at one time or another have been or may well be faced with a need for additional funds for judicial purposes which their county boards of supervisors are unwilling to provide.
>
> We note that our decision is not predicated upon any factual determination made by the trial judge. We do not think that the resolution of the legal issues presented by this case has been prejudiced

> by the fact that they were first considered by a circuit judge just because that judge may wish to join with his colleagues some day in exercising the power claimed by the Wayne circuit judges. The county's argument would make ineligible all Michigan judges because the judges of our Court and the justices of the Michigan Supreme Court may some day be obliged to assert and exercise the inherent power of an independent branch of government."

Subsequent to the decision of the Michigan Supreme Court on rehearing as set forth in Appendix A to the Petition, the County petitioned the Michigan Supreme Court for an order staying the execution of the judgment set forth in Appendix B to the Petition. Such Petition was denied by the Michigan Supreme Court. Thereafter, the County filed a Petition for Stay of Execution of Judgment Pending The Filing And Disposition of a Petition for Writ of Certiorari with Mr. Justice Potter Stewart, averring that the "60-day grace period" given by the Michigan Supreme Court "will expire December 19, 1971." Mr. Justice Stewart denied such Petition on December 21, 1971.

REASONS WHY WRIT SHOULD NOT BE GRANTED

The County advances two reasons why certiorari should be granted:

1. That the latest action of the Michigan Supreme Court "violates [the] separation of powers doctrine" and "denies to the Petitioner Wayne County, a political subdivision and an arm of the State of Michigan, a republican form of government guaranteed by the Constitution of the United States, Article IV, Sec. 4." (Petition, p. 14.)

2. That the County was denied due process of law under the Fourteenth Amendment because it was allegedly de-

nied "a neutral forum" because a judge for the third judicial circuit allegedly heard the case involving the Judges of the Third Judicial Circuit. (Petition, p. 14.)[2]

This Court should disallow petitioner's request for all or any one of the following reasons:

A. No federal question is presented.

No federal question is presented.

B. Re republican form of government.

The issue as to whether a state has a republican form of government is non-justiciable. *Luther* v *Borden*, 7 How 1 (1849); *Highland Farms* v *Agnew*, 300 U.S. 608, 612-613 (1937).

C. The County has no standing to invoke the Fourteenth Amendment.

The County, "a political subdivision and an arm of the State of Michigan" (Petition, p. 14), does not have standing to invoke the Fourteenth Amendment.

In *Coleman* v *Miller*, 307 U.S. 433, 441 (1939), this Court said of municipal corporations, "being but creatures of the State, [they] have no standing to invoke . . . the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." See also *Hunter* v *City of Pittsburgh*, 207 U.S. 161, 178-179 (1907).

D. The County and its agencies are not "persons" within the protection of the Fourteenth Amendment.

The County and its agencies bring this action solely in

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[2] This formulation of the issue is incorrect and misleading. Judge William John Beer, who originally heard the case, was a judge of the Sixth Judicial Circuit, Oakland County, sitting by special designation in the Third Judicial Circuit, Wayne County. (See Petition, p. 6.)

their official capacity as a subdivision of state government and therefore are not "persons" within the meaning and protection of the Fourteenth Amendment. *Columbus & Greenville Railway Co.* v *Miller*, 283 U.S. 96, 99, 100 (1931); *Risty et al, County Commissioners et al* v *Chicago, Rock Island & Pacific Railway Company*, 270 U.S. 378, 390 (1926).

E. Re separation of powers.

The Michigan Supreme Court recognized the doctrine of separation of powers. Indeed, its latest opinion reported as Appendix A to the Petition is based in large part upon such doctrine of separation of powers.

The judiciary's power to compel funds for its reasonable needs from the legislative branch only maintains a proper balance between the legislative and judicial branches of government. Contrary to the County's assertion, the inherent power of the judiciary as stated by the Michigan Supreme Court does not make the judiciary supreme as against the legislative branch in Michigan, except in the limited area of the judiciary's constitutionally mandated power and responsibility to dispense justice as set forth in the Michigan Constitution, 1963 Article VI, Sec. 1., Sec. 4.[3]

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[3] **Judicial power in court of justice; divisions. SECTION 1.** The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

General superintending control over courts; writs; appellate jurisdiction. SEC. 4. The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

The latest holding of the Michigan Supreme Court in this respect is in accord with holdings of the highest courts of other states. *State, ex rel Weinstein* v *St. Louis County,* 451 SW 2d 99 (Mo. 1970); *Noble County Council* v *State, ex rel Fifer,* 234 Ind 172, 125 NE 2d 709 (1955); *Commonwealth, ex rel Carroll* v *Tate,* 442 Pa 45, 274 A 2d 193 (1971), cert. den. 402 U.S. 974 (1971).

In any event, however, the matter of separation of powers or lack thereof does not present any question under the Federal Constitution. The County does not cite and there is no provision in the Federal Constitution requiring the states to provide for the separation of powers. *Dreyer* v *Illinois,* 187 U.S. 71, 83-84 (1902); *Highland Farms* v *Agnew, supra,* 300 U.S. at 612-613.

F. Re disqualification of trial judge.

The argument that the County advances that all circuit judges of the State of Michigan were disqualified by reason of bias and self-interest from hearing the case would lead to the absurd result that no judicial relief would have been available to the Wayne County Judges, because under the County's theory, the entire judiciary in Michigan was in fact directly interested in the outcome of the case and therefore disqualified. This Court, itself, has over objection heard and decided a case in which its own interest was far more direct and immediate than that of the circuit judge in the case at bar. *Evans* v *Gore,* 253 U.S. 245, 247-248 (1920).

If the County is correct in its present contention, then the Supreme Court should not have heard *Marbury* v *Madison,* 5 U.S. 137, because there for the first time this Court enunciated the doctrine that the Court could nullify legi la-

tion, which the Court held to be in conflict with the Constitution, a matter which vitally concerned the power of the Court.

CONCLUSION

The Michigan Supreme Court on rehearing adopted the original Dethmers-Black opinion (reported as Appendix F to the Petition). In that opinion, the Court noted:

> "The reasonableness of the amounts asked for by the Wayne judges to provide such help is not contested, nor could it be. All such questions were settled by proof or formal concession, leaving only the real defense; that the defendant county simply hasn't sufficient money to meet all demands upon the county treasury and that it has the exclusive power to determine and allocate where its available funds should go. That defense is simply that the judicial system of Michigan lacks the power to create valid charges upon funds of the county. It was rejected in the *Stowell Case, supra,* and we should reject it now."

For the foregoing reasons, the Court should deny the Writ for Certiorari.

Respectfully submitted,

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